

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

6 SUSAN M. SANDBURG, )  
7 Plaintiff, ) No. CV-10-219-JPH  
8 v. ) ORDER GRANTING PLAINTIFF'S  
9 MICHAEL J. ASTRUE, Commissioner ) MOTION FOR SUMMARY JUDGMENT  
10 of Social Security, )  
11 Defendant. )  
12 )

BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on December 2, 2011 (ECF No. 14, 17). Attorney Maureen J. Rosette represents plaintiff; Special Assistant United States Attorney Thomas Inman represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge (ECF No. 4). On November 8, 2011, plaintiff filed a reply (ECF No. 19). After reviewing the administrative record and the briefs filed by the parties, the court **grants** plaintiff's motion for summary judgment (ECF No. 14) and reverses and remands for further proceedings pursuant to sentence four.

## JURISDICTION

Plaintiff protectively applied for disability insurance (DIB) and social security income (SSI) benefits on September 10, 2007, alleging disability beginning September 1, 2004 (Tr. 115-116).

**ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT**

1 118; 119-126). The applications were denied initially and on  
2 reconsideration, based on finding DAA is material to disability  
3 (Tr. 78-80, 81-83, 84-85, 86-88). At a hearing before  
4 Administrative Law Judge (ALJ) Paul Gaughen on June 16, 2009,  
5 plaintiff, represented by counsel, and medical and vocational  
6 experts testified (Tr. 36-71). On July 16, 2009, the ALJ issued an  
7 unfavorable decision (Tr. 16-28). The Appeals Council denied  
8 review on May 27, 2010 (Tr. 1-3), making the ALJ's decision the  
9 final decision of the Commissioner. Pursuant to 42 U.S.C. §  
10 405(g), the final decision is appealable to the district court.  
11 Plaintiff sought judicial review on July 14, 2010 (ECF No. 1).

12 **STATEMENT OF FACTS**

13 The facts have been presented in the administrative hearing  
14 transcript, the ALJ's decision, the briefs of the parties, and are  
15 briefly summarized here where relevant.

16 Plaintiff was 47 years old at onset. She earned a GED and  
17 completed one and a half years of college (Tr. 47, 156, 243). She  
18 has worked as a stock clerk, produce clerk, skating rink manager,  
19 waitress, and companion (Tr. 62, 156, 180, 220).

20 Ms. Sandburg testified she was an alcoholic when she was ten  
21 and eleven years old, and used drugs. At the time of the hearing  
22 she had been clean since February 8th or 9th of 2009 (Tr. 55;  
23 1473).

24 For financial reasons Plaintiff does not drive. She takes the  
25 bus alone, gets along with others, and has a mentor who helps her  
26 with shopping, laundry, and managing money. She does not feel she  
27 is able to work despite being clean and sober for four and a half  
28 months because prescribed medication makes her drowsy in the

1 morning. Prescribed medication helps with, but does not eliminate,  
2 nightmares (Tr. 54-60).

3 Plaintiff's application alleged she cannot work due to post-  
4 traumatic stress disorder (PTSD), depression, anxiety, mood  
5 disorder, and low IQ (Tr. 15).

6 **SEQUENTIAL EVALUATION PROCESS**

7 The Social Security Act (the Act) defines disability as the  
8 "inability to engage in any substantial gainful activity by reason  
9 of any medically determinable physical or mental impairment which  
10 can be expected to result in death or which has lasted or can be  
11 expected to last for a continuous period of not less than twelve  
12 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also  
13 provides that a Plaintiff shall be determined to be under a  
14 disability only if any impairments are of such severity that a  
15 plaintiff is not only unable to do previous work but cannot,  
16 considering plaintiff's age, education and work experiences,  
17 engage in any other substantial gainful work which exists in the  
18 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
19 Thus, the definition of disability consists of both medical and  
20 vocational components. *Edlund v. Massanari*, 253 F.3d 52, 1156 (9<sup>th</sup>  
21 Cir. 2001).

22 The Commissioner has established a five-step sequential  
23 evaluation process for determining whether a person is disabled.  
24 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
25 is engaged in substantial gainful activities. If so, benefits are  
26 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,  
27 the decision maker proceeds to step two, which determines whether  
28 plaintiff has a medically severe impairment or combination of

1 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

2 If plaintiff does not have a severe impairment or combination  
 3 of impairments, the disability claim is denied. If the impairment  
 4 is severe, the evaluation proceeds to the third step, which  
 5 compares plaintiff's impairment with a number of listed  
 6 impairments acknowledged by the Commissioner to be so severe as to  
 7 preclude substantial gainful activity. 20 C.F.R. §§  
 8 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P,  
 9 App. 1. If the impairment meets or equals one of the listed  
 10 impairments, plaintiff is conclusively presumed to be disabled.  
 11 If the impairment is not one conclusively presumed to be  
 12 disabling, the evaluation proceeds to the fourth step, which  
 13 determines whether the impairment prevents plaintiff from  
 14 performing work which was performed in the past. If a plaintiff is  
 15 able to perform previous work, that Plaintiff is deemed not  
 16 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At  
 17 this step, plaintiff's residual functional capacity (RFC)  
 18 assessment is considered. If plaintiff cannot perform this work,  
 19 the fifth and final step in the process determines whether  
 20 plaintiff is able to perform other work in the national economy in  
 21 view of plaintiff's residual functional capacity, age, education  
 22 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
 23 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

24 The initial burden of proof rests upon plaintiff to establish  
 25 a *prima facie* case of entitlement to disability benefits.

26 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
 27 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
 28 met once plaintiff establishes that a physical or mental

1 impairment prevents the performance of previous work. *Hoffman v.*  
 2 *Heckler*, 785 F.3d 1423, 1425 (9<sup>th</sup> Cir. 1986). The burden then  
 3 shifts, at step five, to the Commissioner to show that (1)  
 4 plaintiff can perform other substantial gainful activity and (2) a  
 5 "significant number of jobs exist in the national economy" which  
 6 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
 7 Cir. 1984); *Tackett v. Apfel*, 180 F.3d 1094, 1099 (1999).

8 Plaintiff has the burden of showing that drug and alcohol  
 9 addiction (DAA) is not a contributing factor material to  
 10 disability. *Ball v. Massanari*, 254 F.3d 817, 823 (9<sup>th</sup> Cir. 2001).  
 11 The Social Security Act bars payment of benefits when drug  
 12 addiction and/or alcoholism is a contributing factor material to a  
 13 disability claim. 42 U.S.C. §§ 423 (d)(2)(C) and 1382 (a)(3)(J);  
 14 *Bustamante v. Massanari*, 262 F.3d 949 (9<sup>th</sup> Cir. 2001); *Sousa v.*  
 15 *Callahan*, 143 F.3d 1240, 1245 (9<sup>th</sup> Cir. 1998). If there is  
 16 evidence of DAA and the individual succeeds in proving disability,  
 17 the Commissioner must determine whether substance abuse is a  
 18 contributing factor material to the determination of disability.  
 19 20 C.F.R. §§ 404.1535 and 416.935. If the ALJ finds that the  
 20 claimant is not disabled, then the claimant is not entitled to  
 21 benefits and there is no need to proceed with the analysis to  
 22 determine whether substance abuse is a contributing factor  
 23 material to disability. However, if the ALJ finds that the  
 24 claimant is disabled, then the ALJ must proceed to determine if  
 25 the claimant would be disabled if he or she stopped using alcohol  
 26 or drugs.

27 This case involves reviewing the ALJ's materiality  
 28 determination.

1 || / / /

## **STANDARD OF REVIEW**

Congress has provided a limited scope of judicial review of a Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold the Commissioner's decision, made through an ALJ, when the determination is not based on legal error and is supported by substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup> Cir. 1985); *Tackett*, 180 F.3d at 1097 (9<sup>th</sup> Cir. 1999). "The [Commissioner's] determination that a plaintiff is not disabled will be upheld if the findings of fact are supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup> Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch inferences and conclusions as the [Commissioner] may reasonably draw from the evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On review, the Court considers the record as a whole, not just the evidence supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989)(quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

27 It is the role of the trier of fact, not this Court, to  
28 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If

1 evidence supports more than one rational interpretation, the Court  
2 may not substitute its judgment for that of the Commissioner.  
3 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
4 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by substantial  
5 evidence will still be set aside if the proper legal standards  
6 were not applied in weighing the evidence and making the decision.  
7 *Brawner v. Secretary of Health and Human Services*, 839 F.2d 432,  
8 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial evidence to  
9 support the administrative findings, or if there is conflicting  
10 evidence that will support a finding of either disability or  
11 nondisability, the finding of the Commissioner is conclusive.  
12 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir. 1987).

#### 13                   **ALJ'S FINDINGS**

14         The ALJ found plaintiff's DIB insurance was valid through  
15 March 31, 2009 (Tr. 16, 18). At step one, he found plaintiff did  
16 not work at SGA levels after onset (Tr. 19). At step two, he found  
17 she suffers from the severe impairments of substance abuse,  
18 substance induced mood disorder, and antisocial personality  
19 disorder (Tr. 19). At step three, when DAA is included, the ALJ  
20 found plaintiff's impairments meet the requirements of Listings  
21 12.04, 12.08, and 12.09 (Tr. 19). The ALJ found plaintiff is  
22 disabled when DAA is included.

23         Based on finding plaintiff disabled and DAA present, the ALJ  
24 conducted the required second sequential evaluation to determine  
25 whether DAA is material to the disability determination. At steps  
26 two and three, he found plaintiff's impairments without substance  
27 abuse are severe but do not meet or medically equal the listings  
28 (Tr. 20). At step four, when DAA is excluded, he found plaintiff

1 is able to perform her past relevant work as a stocking and  
2 produce clerk (Tr. 27). He concluded because plaintiff would not  
3 be disabled if she stopped abusing substances, DAA is a  
4 contributing factor material to the disability determination. The  
5 ALJ found plaintiff is barred from receiving benefits and  
6 therefore has not been disabled as defined by the Social Security  
7 Act during the relevant period (Tr. 28).

8   **ISSUES**

9 Plaintiff alleges the ALJ erred when he weighed the evidence  
10 of psychological impairment (ECF No. 15 at 10-11), including (1)  
11 the April and October 2004 opinions of examining psychologist  
12 Kevin Shearer, MA, and Frank Rosenkrans, Ph.D. (ECF No. 15 at 12-  
13); (2) the July 2006 and 2007 opinions of examining  
14 psychologists Victoria Carroll, MS, and W. Scott Mabee, Ph.D. (ECF  
15 No. 15 at 13-15); and (3) the October 2006 and March 2008 opinions  
16 of examining doctors Michael Wu, M.D., and Peter Rosales, M.D.,  
17 respectively (ECF No. 15 at 15). Last, plaintiff alleges the ALJ  
18 failed to properly credit the December 2007 opinion of agency  
19 reviewing psychologist James Baily, Ph.D. (ECF No. 15 at 15-16).  
20 She does not challenge the ALJ's negative credibility  
21 determination.

22 Asserting the ALJ's decision is supported by substantial  
23 evidence and free of legal error, the Commissioner asks the Court  
24 to affirm (ECF No. 18 at 14-15).

25   **DISCUSSION**

26   **A. Standards for weighing medical evidence**

27   In social security proceedings, the claimant must prove the  
28 existence of a physical or mental impairment by providing medical

1 evidence consisting of signs, symptoms, and laboratory findings;  
 2 the claimant's own statement of symptoms alone will not suffice.  
 3 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated  
 4 on the basis of a medically determinable impairment which can be  
 5 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once  
 6 medical evidence of an underlying impairment has been shown,  
 7 medical findings are not required to support the alleged severity  
 8 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9<sup>th</sup> Cir.  
 9 1991).

10 A treating physician's opinion is given special weight  
 11 because of familiarity with the claimant and the claimant's  
 12 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9<sup>th</sup> Cir.  
 13 1989). However, the treating physician's opinion is not  
 14 "necessarily conclusive as to either a physical condition or the  
 15 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,  
 16 751 (9<sup>th</sup> Cir. 1989)(citations omitted). More weight is given to a  
 17 treating physician than an examining physician. *Lester v. Chater*,  
 18 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). Correspondingly, more weight is  
 19 given to the opinions of treating and examining physicians than to  
 20 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592  
 21 (9<sup>th</sup> Cir. 2004). If the treating or examining physician's opinions  
 22 are not contradicted, they can be rejected only with clear and  
 23 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the  
 24 ALJ may reject an opinion if he states specific, legitimate  
 25 reasons that are supported by substantial evidence. See *Flaten v.*  
 26 *Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463 (9<sup>th</sup> Cir.  
 27 1995).

28 In addition to the testimony of a nonexamining medical

1 advisor, the ALJ must have other evidence to support a decision to  
 2 reject the opinion of a treating physician, such as laboratory  
 3 test results, contrary reports from examining physicians, and  
 4 testimony from the claimant that was inconsistent with the  
 5 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,  
 6 751-52 (9<sup>th</sup> Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9<sup>th</sup>  
 7 Cir. 1995).

8 **B. Credibility**

9 To aid in weighing the conflicting medical evidence, the ALJ  
 10 evaluated plaintiff's credibility and found her less than fully  
 11 credible (Tr. 23-25). Credibility determinations bear on  
 12 evaluations of medical evidence when an ALJ is presented with  
 13 conflicting medical opinions or inconsistency between a claimant's  
 14 subjective complaints and diagnosed condition. See *Webb v.*  
 15 *Barnhart*, 433 F.3d 683, 688 (9<sup>th</sup> Cir. 2005).

16 It is the province of the ALJ to make credibility  
 17 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir.  
 18 1995). However, the ALJ's findings must be supported by specific  
 19 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9<sup>th</sup> Cir.  
 20 1990). Once the claimant produces medical evidence of an  
 21 underlying medical impairment, the ALJ may not discredit testimony  
 22 as to the severity of an impairment because it is unsupported by  
 23 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir.  
 24 1998). Absent affirmative evidence of malingering, the ALJ's  
 25 reasons for rejecting the claimant's testimony must be "clear and  
 26 convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1995).  
 27 "General findings are insufficient: rather the ALJ must identify  
 28 what testimony not credible and what evidence undermines the

1 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*  
 2 *Shalala*, 12 F.3d 915, 918 (9<sup>th</sup> Cir. 1993).

3 Plaintiff does not challenge the ALJ's credibility  
 4 determination on appeal. The court discusses it because it is  
 5 relevant to the ALJ's assessment of the medical evidence. The  
 6 ALJ's credibility assessment is supported by clear and convincing  
 7 reasons, including, in part, inconsistent statements and test  
 8 results suggesting exaggeration (Tr. 23, 26).

9       (1) *Inconsistent statements*

10       At the hearing plaintiff denied she was "kicked out" of  
  11 Miriam's House for drinking (Tr. 54). The ALJ points out the  
  12 record indicates otherwise (Tr. 24, 332). She has inconsistently  
  13 described substance use. The ALJ notes on November 1, 2006,  
  14 plaintiff stated she had been clean and sober for three years,  
  15 i.e., since 2003. However, records show four hospitalizations for  
  16 substance abuse during the period of claimed sobriety: in December  
  17 of 2004, and July, August and September of 2006 (Tr. 23, referring  
  18 to Ex. 1F, 2F/31, 3F/5-7, 3F/8-11, 3F/13-16, 7F/5-9, 28F/6).

19       (2) *Test results*

20       Plaintiff's results on the MMPI-2 on July 13, 2006, were  
  21 invalid, and the Rey 15-item results were at the cut off for  
  22 determining effort. The ALJ points out this indicates the  
  23 possibility of exaggerating symptoms "or trying to make herself  
  24 appear more impaired" (Tr. 26, citing Ex. 28F). Dr. Klein  
  25 testified the MMPI-2 results are consistent with "gross  
  26 exaggeration of symptoms for the purpose of manipulating others"  
  27 (Tr. 43).

28       Inconsistent statements impair credibility. *Thomas v.*

1 *Barnhart*, 278 F.3d 947, 958-59 (9<sup>th</sup> Cir. 2002). A tendency to  
 2 exaggerate symptoms may be considered when determining  
 3 credibility. See *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9<sup>th</sup>  
 4 Cir. 2001)(holding that a credibility determination based on,  
 5 among other things, a tendency to exaggerate, was supported by  
 6 substantial evidence).

7       The ALJ's credibility assessment is free of legal error and  
 8 supported by the record.

9 **C. Opinions of psychological limitations and materiality of DAA**

10     Plaintiff alleges the ALJ should have credited Dr.  
 11 Rosenkrans' opinions before onset, in April 2004 (Tr. 1381-1393),  
 12 and after, in October 2004 (Tr. 1394-1403). Dr. Rosenkrans  
 13 assessed several marked and moderate limitations (ECF No. 15 at  
 14 12-13, 17).

15     She alleges the ALJ should have credited the opinions in July  
 16 2006 (Tr. 1404-1413) and July 2007 (Tr. 337-346) of Victoria  
 17 Carroll, MS, and W. Scott Mabee, Ph.D. (ECF No. 15 at 13-14). They  
 18 assessed moderate, marked, and severe limitations.

19     Two psychiatrists at Spokane Mental Health assessed GAFs of  
 20 45, indicating serious symptomology (Tr. 268, 1474). Plaintiff  
 21 alleges the ALJ should have credited the November 1, 2006, opinion  
 22 of Michael Wu, M.D. (Tr. 265-269), and the March 2008, opinion of  
 23 Peter Rosales, M.D. (Tr. 1472-1474)(ECF No. 15 at 15). The  
 24 Commissioner does not directly respond to this argument.

25     In December 2007, reviewing psychologist Dr. Bailey assessed  
 26 ten moderate limitations (Tr. 812-813). He diagnosed DAA (in  
 27 part)(Tr. 806). The ALJ notes Dr. Bailey opined plaintiff could  
 28 sustain concentration on simple to semi-skilled tasks when drug

1 free (Tr. 25, citing Tr. 814). Additional evidence was received  
2 after Dr. Bailey rendered his opinion, including records from  
3 January through September of 2008 (see e.g. Tr. 1149, 1160, 1414-  
4 1420, 1508, 1523). In April 2008, Mary Gentile, Ph.D., noted  
5 plaintiff's problems were recently exacerbated due to drug use.  
6 She affirmed Dr. Bailey's assessment (Tr. 1252).

7 Dr. Klein, the testifying psychologist, assessed two moderate  
8 social limitations when DAA is excluded: the ability to work with  
9 the general public and accept criticism from supervisors (Tr. 44).  
10 He opined plaintiff has more than adequate skills to perform a  
11 wide variety of jobs if DAA is excluded, and the only thing  
12 preventing work was excessive drug use (Tr. 45). Dr. Klein notes  
13 plaintiff reported she was clean and sober for eleven months prior  
14 to July 5, 2006, when she used cocaine and drank beer (Exhibit  
15 28F/6, Tr. 1409). The means plaintiff would have been drug free  
16 from about June 2005 until June 2006.

17 However, records in May 2006 show Plaintiff told providers  
18 she used methamphetamine daily for one year until recently, that  
19 is, from about April 2005 through April 2006 (Tr. 1595).

20 Plaintiff alleges the evidence shows DAA is not material  
21 because, even without it, she suffers "at least moderate  
22 limitations" performing complex tasks. She alleges the ALJ should  
23 have credited Dr. Mabee's opinion she suffers marked and moderate  
24 limitations that are most likely not "the result of alcohol or  
25 drug abuse" (ECF No. 15 at 17-19).

26 The Commissioner answers that plaintiff's impairments have  
27 been "assessed as mild, or at most moderate, following periods of  
28 inpatient treatment, when [she] abstained from substance abuse and

1 complied with her medication regimen" (ECF No. 18 at 15).

2 The Commissioner is not entirely correct.

3 To ascertain whether DAA is material to the disability  
 4 determination, the court must examine plaintiff's functioning when  
 5 clean and sober. In unpublished decisions, the Ninth Circuit has  
 6 suggested examining a drug-free period of one month may be  
 7 appropriate.<sup>1</sup> It may be logically inferred that, if after one month  
 8 clean the other impairments are still disabling, DAA should not be  
 9 considered material.

10 The ALJ correctly observes Dr. Rosenkrans' November 2004  
 11 (post onset) opinion simply lists substance abuse (cocaine and  
 12 alcohol abuse) as rule out diagnoses (Tr. 26, 1402), meaning the  
 13 opinion did not separate out the effects of DAA.

14 When Dr. Wu examined plaintiff on October 19, 2006, he  
 15 diagnosed, in part, substance abuse in partial remission.  
 16 Plaintiff indicated she had been hospitalized after relapsing on  
 17 cocaine, and was released from the hospital on October 2, 2006  
 18 (Tr. 257, 265, 320-322). As noted, Dr. Wu assessed a GAF of  
 19 45, indicating serious symptomology. Dr. Wu's opinion was based on  
 20 seventeen days (at most) without substance abuse.

21

22

---

<sup>1</sup>

23 The Social Security Administration's prescribed process in the  
 24 Programs Operations Manual System (POMS) indicates that where  
 25 "the evidence documents that, after a drug-free period of 1  
 month, the other impairment(s) is by itself not disabling," then  
 26 DAA is material. See POMS § DI 90070.050(D)(3). As discussed in  
*Ingram v. Barnhart*, 72 F. App'x 631, 636 n.30 (9<sup>th</sup> Cir. 2003),  
 27 although the POMS "lacks the force of law . . . , [t]he logical  
 inference is that if, after a drug-[ ]free period of one month,  
 28 the other impairments are still disabling, the individual's drug  
 and alcohol addiction should not be considered material." Such a  
 "logical inference" may also be appropriate here.

1       The ALJ rejected some of the examiner's opinions due to  
2 plaintiff's substance abuse near the time of the evaluation. He  
3 notes plaintiff told Dr. Mabee on July 13, 2006, she was sober at  
4 the time of the evaluation; however, she was hospitalized soon  
5 thereafter for psychosis and cocaine dependence, and was  
6 hospitalized before the evaluation, on July 5, 2006, because she  
7 drank beer and ingested cocaine (Tr. 26, referring to 275, 323,  
8 1409). With respect to the 2007 evaluation, the ALJ points out  
9 plaintiff was not compliant with taking prescribed medication,  
10 abused substances near the time of the evaluation, and tested  
11 positive for methamphetamine three days after the evaluation (Tr.  
12 27, referring to 237, 254, 276, 323, 326, 425-428, 433). The form  
13 states there is no indication of DAA (Tr. 338-339).

14       The ALJ generally concluded many of the assessed limitations  
15 can be attributed to substance abuse (Tr. 26). This does not  
16 answer the question of how plaintiff functions in the absence of  
17 DAA.

18       After a sixty day in-patient treatment program for chemical  
19 dependency, on April 19, 2007, Dr. Wu again assessed a GAF of 45,  
20 indicating serious symptomology (Tr. 259). Prior to this  
21 evaluation, Dr. Wu saw plaintiff four times from October 2006  
22 through January 2007, for medication management (Tr. 262-266,  
23 306). At the April 2007 appointment plaintiff said she had not  
24 suffered any nightmares since starting a different medication;  
25 denied significant mood problems; reported some anxiety; and  
26 described occasionally waking at night. She opined her medications  
27 are "going well." This somewhat ambiguous opinion appears based on  
28 plaintiff's functioning after 60 days of sobriety.

1       Nearly a year later, Dr. Rosales assessed a GAF of 45 after  
2 he examined plaintiff March 14, 2008 (Tr. 1474). He diagnosed  
3 polysubstance abuse, in part. Plaintiff said she relapsed on drugs  
4 three times in the past two months and used marijuana a month  
5 before the evaluation (Id.). Records show plaintiff tested  
6 positive for cocaine on February 5, 2008 (Tr. 1149). Dr. Rosales's  
7 contradicted opinion is entitled to some weight when determining  
8 plaintiff's limitations when she is clean and sober, because it  
9 appears plaintiff may have been clean and sober for a month before  
10 the evaluation.

11       Prior to Drs. Wu and Rosales' opinions, in July 2006, John  
12 McRae, Ph.D., opined he could not clearly determine what plaintiff  
13 "would function like" without DAA (Tr. 568). He opined it was  
14 better to err on the side of caution and presume DAA was not  
15 material.

16       Numerous GAFs assessed at discharge, both from Sacred Heart  
17 and Eastern State Hospital, contradict those of Drs. Wu and  
18 Rosales and assess plaintiff as no more than moderately limited.  
19 These opinions, though, are based on functioning after shorter  
20 periods of sobriety. A GAF of 60, indicating moderate problems,  
21 was assessed at discharge on September 6, 2006, after a maximum of  
22 15 days clean. [Plaintiff was hospitalized on August 27, 2006, and  
23 admitted using methamphetamine five days earlier, on August 22,  
24 2006.] (Tr. 323-326). At discharge on January 25, 2007, Sajid  
25 Ravasia, M.D., assessed a GAF of 70, indicating no more than mild  
26 problems, after six days without DAA (Tr. 316); on August 17,  
27 2007, a discharge GAF of 65 was assessed (Tr. 425); and in July  
28 and September of 2008, GAFs of 70 again were assessed at discharge

1 (Tr. 419-420), with periods of sobriety either less than 30 days  
2 or unclear.

The ALJ does not discuss Dr. Wu's April 2007 opinion following plaintiff's 60 days of sobriety. Even if Dr. Wu is viewed as an examining (rather than treating) doctor, the court finds the ALJ's failure to provide reasons for rejecting this opinion is reversible error. See *Lester v. Chater*, 81 F.3d 830 (if treating or examining doctor's opinion is not contradicted, the ALJ can only reject for clear and convincing reasons); *Flaten v. Secretary of Health and Human Services*, 44 F.3d 1453, 1463 (9<sup>th</sup> Cir. 1995)(if contradicted, such opinions can only be rejected if the ALJ states specific, legitimate reasons that are supported by substantial evidence).

14 | E. Remand

15 Dr. Klein, like the ALJ, did not specifically address Dr.  
16 Wu's assessed GAF of 45 after plaintiff was released from a 60 day  
17 in-patient treatment program.

18 The ALJ opines plaintiff's daily activities are not  
19 significantly limited (Tr. 24), but he fails to separate the  
20 activities plaintiff is capable of when using substances versus  
21 when clean.

Because the record does not clearly establish if DAA is material to the disability determination, and the ALJ appears to have disregarded a relevant opinion on this issue, the matter must be reversed and remanded to determine plaintiff's functioning when DAA is excluded.

## **CONCLUSION**

Having reviewed the record and the ALJ's conclusions, this

1 court finds that the ALJ's decision contains legal error and is  
2 not supported by substantial evidence.

**IT IS ORDERED:**

1. Plaintiff's Motion for Summary Judgment (**ECF No. 14**) is granted. The case is REVERSED and REMANDED for further proceedings pursuant to sentence four.

7       2. The District Court Executive is directed to file this  
8 Order, provide copies to counsel, enter judgment in favor of  
9 plaintiff, and CLOSE this file.

10 DATED this 6th day of January, 2012.

s/ James P. Hutton  
JAMES P. HUTTON  
UNITED STATES MAGISTRATE JUDGE